

ODELL D. HODGES,  
Plaintiff,  
v.  
B. DUTTON, et al.,  
Defendants.

Case No. [18-cv-04658-EJD](#) (VKD)

**ORDER RE JANUARY 6, 2022  
DISCOVERY DISPUTE**

Re: Dkt. No. 71

Plaintiff Odell Hodges and defendants B. Dutton and C. Johnsen ask the Court to resolve their dispute regarding whether a [prospective] protective order should be entered, and if so, whether it should include restrictions relating to inmate witnesses and personal identifying information. This matter is suitable for resolution without a hearing. Civil L.R. 7-1(b).

**I. BACKGROUND**

In this action, plaintiff, a California state prisoner, asserts an Eighth Amendment deliberate indifference claim pursuant to 42 U.S.C. § 1983 against defendants, correctional officers at San Quentin State Prison where plaintiff is currently housed. Dkt. Nos. 1, 31.<sup>1</sup> The deadline for completion of fact discovery is May 10, 2022. Dkt. No. 61 at 2.

Plaintiff advises that defendants are withholding responsive documents and information from production because the material is confidential, and that discovery in this case will require

<sup>1</sup> Plaintiff has moved to amend his complaint to add claims for the violation of Title II of the Americans with Disabilities Act, 42 U.S.C. § 12133, and for violation of the Rehabilitation Act of 1973, 29 U.S.C. § 701, against the California Department of Corrections and Rehabilitation and San Quentin State Prison, as well as defendants Dutton and Johnsen in their official capacities. Dkt. No. 64. That motion is pending.

1 both sides to produce confidential documents and information.<sup>2</sup> The confidential material  
2 expected to be produced in discovery includes: (1) the identities of witnesses who are in custody  
3 and who fear retaliation if their names are disclosed to correctional officers; (2) the medical  
4 information of plaintiff and of other non-party prisoners; and (3) personal identifying information  
5 of defendants and other correctional officers. *See* Dkt. No. 71 at 2, 5.

6 Plaintiff requests entry of a protective order that will govern the production of confidential  
7 material during discovery. *See* Dkt. No. 71-1. Defendants dispute the need for such an order at  
8 this time. However, during the parties' negotiations concerning the terms of a proposed protective  
9 order, defendants proposed certain restrictions on the disclosure of confidential material (disputed  
10 sections 7.3(e) and 12.4). Plaintiff objects to these restrictions.

## 11 II. DISCUSSION

12 Although the action has been pending since August 2, 2018 and fact discovery closes May  
13 10, 2022, the parties appear to have conducted very little discovery. Given the nature of the  
14 documents and information likely to be produced in discovery, entry of a prospective protective  
15 order is appropriate and will facilitate the efficient and timely completion of discovery.

16 The Court now considers the two protective order provisions in dispute.

### 17 A. Section 7.3(e)

18 Section 7.3 of plaintiff's proposed protective order concerns disclosure of material  
19 designated "highly confidential—attorneys' eyes only." This "highly confidential" material is  
20 elsewhere defined as:

21 information . . . or tangible things that qualify for protection under  
22 Federal Rule of Civil Procedure 26(c) and for attorney's eyes only.  
23 The criteria for such designation shall be whether the Party has a  
24 good-faith belief that the information is entitled to protection from  
25 disclosure to non-attorneys, because such information constitutes or  
discloses information which, if disclosed to non-attorneys would  
cause significant harm, including but not limited to by causing threats  
to prison safety or security, or the safety or security of any inmate,  
parolee, prison staff, or third party coming into contact with any of

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27 <sup>2</sup> The Court understands that, at present, the discovery at issue involves Rule 26 mandatory initial  
28 disclosures, which the parties were required to exchange by October 5, 2021 (*see* Dkt. No. 61 at 2)  
and "an informal request for documents previously filed under seal with the court." Dkt. No. 71 at  
2, 5.

1 the preceding.

2 Dkt. No. 71-1 (section 2.3). The parties appear not to dispute that a “highly confidential”  
3 document may be shown to any deposition witness who is the “author or recipient” of the  
4 document or “a custodian or other person who otherwise possessed or knew the information.” *See*  
5 *id.* (section 7.3(f)). They dispute the circumstances in which a “highly confidential” document  
6 may be shown to a deposition witness who is an inmate, but who is not an author, recipient,  
7 custodian, or person with knowledge of the contents of the document.

8 In section 7.3(e), plaintiff proposes that any deposition witnesses “to whom disclosure is  
9 reasonably necessary and who have signed the Acknowledgment and Agreement to Be Bound”  
10 may be shown any document designated “highly confidential.” Defendants propose that such a  
11 document may not be shown to “inmate witnesses” unless the party wishing to show the document  
12 demonstrates a “compelling need” for doing so and procures the agreement of the producing party.

13 The Court is not persuaded that plaintiff will be deprived of the ability to “meaningfully  
14 participate in his own lawsuit,” as he contends, if he and other incarcerated witnesses are not  
15 permitted to see “highly confidential” documents produced by defendants without first conferring  
16 with defendants’ counsel and, if necessary, obtaining a court order permitting the disclosure. The  
17 restriction defendants propose is directed to “highly confidential” documents only. These  
18 documents are defined as principally those whose disclosure to non-attorneys poses a risk to safety  
19 or security. The restriction does not apply to “highly confidential” documents that satisfy the  
20 criteria of section 7.3(f) (*i.e.* author, recipient, custodian, person with knowledge) and does not  
21 apply to documents designated “confidential.” The Court expects that there will not be many  
22 circumstances in which it would be reasonably necessary to question an incarcerated witness about  
23 a “highly confidential” document in deposition, where the witness has never seen the document  
24 and does not know its contents.

25 For this reason, the Court adopts defendants’ proposed restriction for section 7.3(e). The  
26 parties may wish to discuss whether this restriction should also extend to correctional officers,  
27 given plaintiff’s concerns regarding possible retaliation against prisoners whose identities may  
28 become known to correctional officers.

1           **B.       Section 12.4**

2           Defendants propose that they be permitted to redact from any “confidential” or “highly  
3           confidential” document all personal information of correctional officers, prison staff, and their  
4           family members in order to protect the safety and security of such individuals. Plaintiff objects  
5           that permitting such redaction will frustrate his investigation because it will prevent him from  
6           identifying relevant witnesses.

7           Plaintiff and defendants both articulate valid concerns. These concerns may be  
8           accommodated as follows: Defendants may designate documents that disclose personal  
9           identifying information of correctional officers, prison staff, and their family members as “highly  
10           confidential.” Defendants may *not* redact the names of correctional officers and prison staff, who  
11           may be relevant witnesses in the case; defendants may redact the names of family members.  
12           Defendants may redact all other personal identifying information listed in the parenthetical in the  
13           proposed text at page 3 of the joint discovery dispute submission. *See* Dkt. No. 71 at 3. However,  
14           if defendants choose to redact this information, they must promptly provide a log indicating that  
15           personal identifying information has been redacted so that such redactions may be distinguished  
16           from redactions made for other purposes, such as attorney-client privilege.

17           **III. CONCLUSION**

18           The parties shall confer further, in view of this order, and submit a proposed protective  
19           order for the Court’s consideration no later than **February 11, 2022**.

20           **IT IS SO ORDERED.**

21           Dated: February 3, 2022

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24           VIRGINIA K. DEMARCHI  
25           United States Magistrate Judge  
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